

## ESCROW AGREEMENT

THIS ESCROW AGREEMENT (the "Agreement") is made and entered into as of this 1<sup>st</sup><sup>2</sup> day of April, 2016, by and among BLACKBIRD FARMS APARTMENTS PHASE II, LLC ("Subdivider"), an Indiana limited liability company, CITY OF WEST LAFAYETTE, INDIANA (the "City"), and LAFAYETTE BANK & TRUST (the "Escrow Agent"), a division of First Merchants Bank, N.A.

### RECITALS

Subdivider is the owner of certain property located on the southwest corner of the intersection of Lindberg Road and McCormick Road, in West Lafayette, Indiana (the "Property").

Subdivider is seeking the primary approval of the preliminary plat for Blackbird III Apartments (the "Subdivision"); APC File No. S-4575), a multi-family subdivision, which pertains to the Property, from the Area Plan Commission of Tippecanoe County, Indiana.

Under Section 5.12(3)(a)(i) of the Unified Subdivision Ordinance of Tippecanoe County, Indiana, ("USO"), Subdivider must install certain pavement improvements in the half-width of McCormick Road adjoining the Property (the "Pavement Improvements").

Under USO Section 5.7(1)(a), (b), and (c), Subdivider must install sidewalks with curbs and gutters, and grassed or landscaped median improvements, along the McCormick frontage of the Property (the "Street Improvements"; collectively, the Pavement Improvements and Street Improvements are referred to as the "Improvements") in connection with the development of the Subdivision.

The City's future McCormick Road infrastructure improvement project likely will require the removal of the Improvements.

In lieu of installing the Improvements, Subdivider desires to contribute an amount equal to the estimated cost and expense of the installation of the Improvements toward the City's McCormick Road infrastructure improvement project along and in the vicinity of the Property.

The City has agreed to waive the requirement that Subdivider install the Improvements, and to construct the Improvements provided that the Subdivider deposit with the Escrow Agent an amount equal to Forty-Five Thousand Eight Hundred Forty-Nine Dollars (\$45,849.00) (the "Escrowed Funds") to be held in escrow by the Escrow Agent pursuant to the terms of this Agreement.

NOW, THEREFORE, Subdivider, the City, and the Escrow Agent agree as follows:

1. **Appointment of Escrow Agent; Deposit of Escrow Funds.** Subdivider and the City hereby constitute and appoint the Escrow Agent as, and the Escrow Agent hereby agrees to assume and perform the duties of, the escrow agent under and pursuant to this Agreement. Further, the Escrow Agent acknowledges receipt of the Escrowed Funds from Subdivider in order to establish the special escrow account (the "Escrow Account").
2. **Escrow Account.** The Escrow Agent shall hold the Escrowed Funds in the Escrow Account on the terms and subject to the conditions of this Agreement. The Escrow Account shall not be subject to lien or attachment by any creditor of any party hereto and shall be used solely for the purpose of reimbursing the City for the costs incurred by the City to install the Improvements. Except as described in this Agreement, amounts held in the Escrow Account shall not be available to, and shall not be used by, the Escrow Agent to set off any obligations of either Subdivider or the City owing to the Escrow Agent in any capacity.
3. **Investment.** Escrow Agent shall invest the Escrowed Funds in one or more investments that will permit the release of the Escrowed Funds in accordance with the terms of this Agreement. Any earnings on any portion of the Escrowed Funds shall be deemed to be part of the Escrowed Funds and shall be held in escrow and shall be disbursed pursuant to the terms of this Agreement. The Escrow Agent shall be authorized to pay out of the earnings on the Escrowed Funds any taxes that may be imposed thereon.

4. **Disbursement.** The Escrow Agent disburse the Escrowed Funds upon written request from the City, as the City incurs expenses associated with the construction of the Improvements.

5. **Acknowledgements.** Subdivider acknowledges and agrees that the payment of the Escrowed Funds as provided in this Agreement is a condition of receiving a variance from the Board of Public Works and Safety of the City from the USO requirement that Subdivider installs the Improvements. In consideration for the deposit of the Escrowed Funds by Subdivider in accordance with this Agreement, the City acknowledges and agrees to install the Improvements; and that Subdivider shall have no further obligations in regard to the installation of the Improvements, or the costs thereof.

6. **Fees; Indemnification.**

a. **Fees.** The fees and expenses of the Escrow Agent shall be borne equally by Subdivider and the City. The Escrow Agent is entitled and is hereby granted the right to set off and deduct any unpaid fees or non-reimbursed expenses, or both, from the Escrow Funds.

b. **Subdivider Indemnity.** Subdivider shall indemnify the Escrow Agent for, and hold it harmless against, any loss, damage, cost, or expense, including but not limited to reasonable attorneys' fees, reasonably incurred by the Escrow Agent in connection with the Escrow Agent's performance of its duties and obligations under this Agreement, as well as the reasonable costs and expenses of defending against any claim or liability relating to this Agreement; provided that notwithstanding the foregoing, Subdivider shall not be required to indemnify the Escrow Agent for any such loss, liability, cost, or expense arising as a result of: (i) any act or failure to act by the City, or (ii) the Escrow Agent's willful misconduct or gross negligence or breach of this Agreement.

c. **City Indemnity.** The City shall indemnify the Escrow Agent for, and hold it harmless against, any loss, damage, cost, or expense, including but not limited to reasonable attorney's fees, reasonably incurred by the Escrow Agent in connection with the Escrow Agent's performance of its duties and obligations under this Agreement, as well as the reasonable costs and expenses of defending against any claim or liability relating to this Agreement; provided that notwithstanding the foregoing, the City shall not be required to indemnify the Escrow Agent for any such loss, liability, cost, or expense arising as a result of: (i) the Escrow Agent's willful misconduct or gross negligence or breach of this Agreement, or (ii) any act or failure to act by Subdivider.

7. **Miscellaneous.**

a. **Entire Agreement; Amendment.** This Agreement sets forth the entire agreement and understanding of the parties hereto in respect to the transactions contemplated hereby and supersedes all prior agreements, arrangements and understandings relating to the subject matter hereof and are not intended to confer upon any other person any rights or remedies hereunder. This Agreement may be amended or modified, and any of the terms hereof may be waived, only by a written instrument duly executed by or on behalf of Subdivider and The City and, with respect to any amendment that would adversely affect the Escrow Agent, the Escrow Agent.

b. **Notices.** Any notice, request, instruction, or other document to be given hereunder by a party hereto shall be in writing and shall be deemed to have been given: (i) when received if given in person, (ii) on the date of transmission if sent by telex, telecopy, or other wire transmission (provided that a copy of such transmission is simultaneously sent in the manner provided in clause (iii) below), or (iii) five (5) days after being deposited with a reputable courier service:

If to the City addressed as follows:

David M. Buck  
Public Works Director  
City of West Lafayette  
Engineering Department  
Morton Community Center  
222 North Chauncey Avenue  
West Lafayette, IN 47906  
Fax: (765) 775-5249



If to Subdivider, addressed as follows:

Blackbird Farms Apartments Phase II, LLC  
301 North Fifth Street  
Lafayette, IN 47901  
ATTN: Keith W. Long  
Fax: (765) 420-7088  
E-mail: keith@whlong.com

with a copy to:

Thomas R. McCully, Esq.  
Marianne Mitten Owen, Esq.  
Stuart & Branigin LLP  
300 Main Street, Suite 900  
P.O. Box 1010  
Lafayette, IN 47902-1010  
Fax: (765) 742-8175  
E-mails: trm@stuartlaw.com, and  
mmo@stuartlaw.com

If to the Escrow Agent, addressed as follows:

Lafayette Bank & Trust  
250 Main Street  
Lafayette, IN 47901

or to such other individual or address as a party hereto may designate for itself by notice given as herein provided.

c. Waivers. The failure of a party hereto at any time or times to require performance of any provision hereof shall in no manner affect its right at a later time to enforce the same. No waiver by a party of any condition or of any breach of any term, covenant, representation or warranty contained in this Agreement shall be effective unless in writing, and no waiver in any one or more instances shall be deemed to be a further or continuing waiver of any such condition or breach in other instances or a waiver of any other condition or breach of any other term, covenant, representation or warranty.

d. Counterparts. This Agreement may be executed simultaneously in counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

e. Assignment. This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors and assigns; provided, however, that no assignment or other transfer shall be made without the prior written approval of each of the parties hereto.

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SUBDIVIDER:

BLACKBIRD FARMS APARTMENTS PHASE II, LLC  
an Indiana limited liability company

By:

  
Keith W. Long, Member

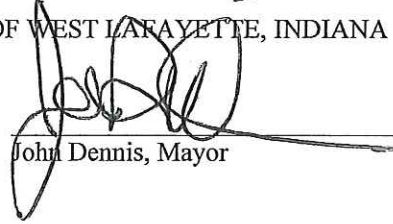
By:

  
Thomas C. Long, Member

CITY:

CITY OF WEST LAFAYETTE, INDIANA

By:

  
John Dennis, Mayor

ESCROW AGENT:

LAFAYETTE BANK & TRUST  
a Division of First Merchants Bank, N.A.

By:

  
Mark W. Molter, Vice President

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